No. 359. 125
Off. of Hamilton & Colbert for Appellees.

FILED
OCT 12 1901
JAMES H. McKENNEY,
Clerk.

Filed Oct. 12, 1901.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1901.

**No. 359.**

FRANCIS WINSLOW *ET AL.*, TRUSTEES, *Appellants*,

vs.

THE BALTIMORE AND OHIO RAILROAD, *Appellee.*

## GROUNDS OF OPPOSITION TO MOTION TO ADVANCE

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LAW REPORTER PRINT.

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"Peculiar and unusual hardship, irremediable by reversal unless speedily had," is the ground upon which the motion for the advancement of this cause is based.

Rule 26 of the rules of practice of this court, once Rule 30, requires cases to be heard in the order in which they stand on the docket, and the ground upon which the appellant bases his request for a departure from this rule does not come within any of the exceptions to said rule.

The case at bar grows out of a controversy over the right of possession of four lots of ground, situated in the city of Washington, being lots numbered from nine (9) to twelve (12), both inclusive, in square numbered seven hundred and ten (710). The controversy is between the Baltimore and Ohio Railroad Company and the appellants, trustees and substituted trustees, under the will of Catherine Pearson, deceased, over the right of possession of certain lots belonging to the estate of said Catherine Pearson, and which have been in the possession of said company since 1872, it having used the same continuously as a part of the right of way and tracks of its Metropolitan branch, duly

authorized by act of Congress to enter into the District of Columbia, the said possession being under several leases dated respectively August 1, 1872, February 1, 1883, January 30, 1888, and October 17, 1892, each of said leases being for the term of five years, respectively—

> "or until such time as the said parties of the first part shall be prepared to convey the said premises, as hereinbefore agreed, with a perfect title in fee simple thereto,"

and all of them containing a provision for renewal for another term of five years. The first lease of August 1, 1872, which is set forth in full (Rec., pp. 7–8), gives the exact provisions contained in all of the subsequent leases referred to and the rent for said terms, to the amount named in the several leases, has been regularly paid by the company to the said trustees, and by said trustees paid over to, and accepted by the life tenant, Mrs. Eliza W. Patterson, who, under the will of said Catherine Pearson, was entitled to the income from said property, and who was in constant correspondence with the company as to the payment of rents, as will appear from her letters (Rec., pp. 60–64). In these letters Mrs. Patterson refers specifically to the property as being her property leased to the company, and as being occupied by the Metropolitan branch of that road (see Exhibit No. 24, Rec. p. 61). Even after the controversy arose between the parties the rents were paid without prejudice to the claims of either party until some time in 1900 (Rec., pp. 11–12).

The cause, therefore, is one in which private interests only are concerned, certainly so far as the rights of the appellants are concerned. The only possible interest of a public nature would be in the line of maintaining the present status and preserving to the company the possession of lots now used for the tracks and right of way of the Metropolitan branch, but this view of the case would operate against the present request of the appellants, and besides does not con-

stitute such a public question as would come under the exception to Rule 26, above referred to.

Passing upon a similar application in United States *vs.* Fossatt, 21 Howard, 445, the court says:

> "No case can be taken up out of its order on the docket, where private interests only are concerned. The only cases where this rule does not apply are those in which the question in dispute will embarrass the Government while it remains unsettled."

Again, in Sage and Others *vs.* The Central Railroad Company of Iowa and Others, 93 U. S. 412, the court says:

> "A cause involving private interests only, will not be advanced for a hearing in preference to other suits on the docket."

In Carter *vs.* Greenhow, 109 U. S. 64, the court has held that—

> "a case will not be taken up out of its order simply because it is of great public importance."

And in Baltimore & Ohio Railroad Company *vs.* Marshal County Supervisors, 131 U. S., Appendix XCIX, in passing upon a motion to advance based upon the ground that very important interests of the State of West Virginia were involved in the litigation, the court held that the cause—

> "does not come within any of the exceptions to the 30th rule (now rule 26) which requires that all cases shall be heard when reached in the regular call of the docket, and in the order in which they are entered. We are obliged, therefore, to deny the motion."

Other decisions where the court upon applications to advance has made similar rulings are to be found, but as they are all in the line of the cases above cited, it is deemed unnecessary to enumerate them.

But even if the ground alleged in this case for advancement was within the rule of this court, an examination of the Record would show that no unusual hardship would or could come to the appellants by waiting the regular call of this case in the order in which it stands upon the docket.

On March 9, 1900, the trustees under the will of Catherine Pearson began suit against the complainant, the Baltimore and Ohio Railroad Company, before a justice of the peace, in the city of Washington. Without trial judgment was entered for the plaintiff, and the cause appealed to the Supreme Court of the District of Columbia, and docketed as suit At Law No. 43,895. Subsequently the trustees brought another suit for the use and occupation of said lots, claiming the sum of $6,500, with interest from the 16th day of April, 1900. On the 4th day of October, 1900, the Baltimore and Ohio Railroad Company filed its bill in these proceedings (Rec., pp. 1–7); this bill was for specific performance and to restrain the proceedings at law above referred to. A temporary restraining order, pending the suit, was allowed, and upon final hearing in the court of equity, the bill was dismissed (Rec., p. 72), an appeal was taken to the Court of Appeals, and the decree of the court of equity was reversed (Rec., pp. 74–83), whereupon the appeal from the Court of Appeals was taken to this court. The Court of Appeals decided that the lease executed by Winslow, trustee, in 1892, and delivered to the company, and acted under by both parties, the rent having been regularly paid to Mrs. Patterson throughout the term created, was a valid lease, said Winslow acting as the agent of the trustees, and being in effect the sole trustee in the active management of the trust (Rec., pp. 79–80). It held further that in view of the use of the property for its right of way, which use was not only authorized by the trustees, but sanctioned throughout for over twenty-five years, by said trustees, and by Mrs. Patterson, the life

tenant, it became so entitled to the property, as not to be liable to trustees for dispossession or any other similar proceedings, but could only be compelled to pay the value of the land. The possession of the property by a railroad, under the circumstances disclosed by the record, was such as to give the public an interest in the continuance of that possession, an interest which the courts would protect.

Without discussing the merits of the case as presented by the record, and without regard to whether the opinion of the Court of Appeals is right or wrong, it certainly appears not only that the rent has been paid by the company to the trustees for the land in question, and according to the terms of the several leases up to January, 1900 (Rec., pp. 11–12), but that the trustees obtained judgment for possession of said property before a justice of the peace, and that this judgment was appealed from by the Railroad Company, which under the provisions of law *was compelled at the time to, and did, give a bond covering intervening rent, damages and costs, and this proceeding is still pending before the Supreme Court of the District of Columbia on said appeal.* That if at any time the judgment of the Court of Appeals should be reversed by this court, the restraining order or effect of said decision upon said suit at law referred to, would be removed, and in the event of a termination of said suit at law in favor of the appellant's trustees, they would be fully protected in the matter of rent, damages and costs. Furthermore suit At Law No. 44,116 (Rec., p. 6) for use and occupation, would under the effects of a reversal by this court, be in a position for trial, in order to determine whether or not anything more had to be paid by the company over and above the rent named in said leases.

Again, the property is occupied by the tracks of the defendant company, and not by any building which could be injured, destroyed, or which could suffer even deterioration. It would thus seem from a consideration of the Record in

its entirety and fullness that the claim upon which the motion to advance is based is without a shadow of foundation in fact. Without regard to the company at all the bond in the suit at law referred to gives all needed protection to the appellants.

It is respectfully submitted that under the rule of this court, and under its uniform practice, as expressed in the cases cited, the motion for advancement of this cause should be overruled.

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